

MAR 17 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

COREY D. SMITH,

Defendant - Appellant.

No. 05-35313

D.C. Nos. CV-04-00759-GMK
CR-03-00024-GMK

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Submitted March 8, 2006^{**}

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Corey D. Smith appeals pro se from the district court's judgment denying his 28 U.S.C. § 2255 motion seeking to vacate his 63-month sentence for assault

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} Because this panel unanimously finds this case suitable for decision without oral argument, Smith's motion for oral argument is denied. *See* Fed. R. App. P. 34(a)(2).

resulting in serious bodily injury. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Smith contends that the application of the four-level sentencing enhancement for use of a dangerous weapon was unconstitutional because the predicate facts were not admitted by him nor proven to a jury beyond a reasonable doubt. The district court correctly determined that Smith may not obtain relief under *Blakely v. Washington*, 542 U.S. 296 (2004), or *United States v. Booker*, 543 U.S. 220 (2005), because his conviction became final before both of those decisions and neither decision is retroactive to cases on collateral review. *See United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005). Nor can Smith obtain relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because “he fails to satisfy the threshold condition of *Apprendi* that the actual sentence imposed be longer than the maximum sentence for the crime for which a defendant has been vaildly convicted.” *See United States v. Ellis*, 241 F.3d 1096, 1104 (9th Cir. 2001). Accordingly, we affirm the sentence.

To the extent that Smith’s brief raises uncertified issues, we construe his arguments as a motion to expand the Certificate of Appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.